No. 87-367

In The

# Supreme Court of the United States

October Term, 1987

BENDIX AUTOLITE CORPORATION,
*Appellant,*

v.

MIDWESCO ENTERPRISES, INC.,
*Appellee,*

INTERNATIONAL BOILER WORKS COMPANY,
*Third-Party Defendant.*

## APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

## BRIEF FOR APPELLEE

IRA J. BORNSTEIN
Counsel of Record
HARVEY J. BARNETT &
ASSOCIATES, LTD.
200 North LaSalle Street
Chicago, Illinois 60601
(312) 782-1869
*Attorney for Appellee*

OF COUNSEL:

HARVEY J. BARNETT
HARVEY J. BARNETT & ASSOCIATES, LTD.
200 North LaSalle Street, Suite 1920
Chicago, Illinois 60601
(312) 782-1869

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

## COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether by denying the benefit of the statute of limitations to corporations which are not licensed to do business in Ohio, the Ohio tolling statute, Ohio Rev. Code § 2305.15, violates the Commerce Clause as applied to Midwesco Enterprises, Inc.

2. Whether the fact that the parties to the contract could have included a provision naming an agent to receive process, which in fact was not done, can avoid the Ohio tolling statute's unconstitutional burden on interstate commerce.

3. Whether the Court of Appeals correctly refused to entertain the argument that the ruling of unconstitutionality of the Ohio tolling statute should be given only prospective effect when such argument was raised for the first time in Bendix's reply brief and had never been raised in the District Court.

## TABLE OF CONTENTS





## TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued





TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued





TABLE OF AUTHORITIES—Continued

No. 87-367

In The

# Supreme Court of the United States

October Term, 1987

BENDIX AUTOLITE CORPORATION,

*Appellant,*

v.

MIDWESCO ENTERPRISES, INC.,

*Appellee,*

INTERNATIONAL BOILER WORKS COMPANY,

*Third-Party Defendant.*

**APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

## BRIEF FOR APPELLEE

## COUNTERSTATEMENT OF THE CASE

Appellant, Bendix Autolite Corporation ("Bendix"), filed its action against Appellee Midwesco Enterprises, Inc.[1] ("Midwesco"), on December 19, 1980 in the United States District Court for the Northern District of Ohio. It sought to recover damages arising out of the sale and installation by Midwesco of a coal-fired boiler system. Bendix began beneficial use of the boiler system on July 3, 1975.

---

[1] Midwesco Enterprises, Inc. is affiliated with Mid-Res, Inc. which is owned by Midwesco and Cofrath America Corp.

Midwesco moved for summary judgment on the ground that appellant's action was barred by Ohio's statute of limitations. The applicable Ohio statute of limitations require that both contract claims and fraud claims be brought within four years. Ohio Rev. Code §§ 1302.98, 2305.09(c). Midwesco first contended that Ohio's tolling statute, Ohio Rev. Code § 2305.15, was inapplicable inasmuch as Midwesco was continually subject to the long arm jurisdiction of the Ohio courts and hence was "present" in Ohio. Midwesco further contended that the tolling statute was unconstitutional as violating both the Commerce Clause of the Constitution and the Fourteenth Amendment thereto.

The District Court's decision issued on April 27, 1983 held that Midwesco was subject to the tolling statute based upon a finding that Midwesco, even though subject to Ohio's long-arm statute, was "out of state" for purposes of the tolling statute. (J.A. 12) In its decision, the District Court held in abeyance Midwesco's arguments that the tolling statute was unconstitutional and granted the parties the right to seek leave of court to participate in oral arguments in *Copley v. Heil-Quaker Corp.*, No. C 82-512. (J.A. 18) *Copley*, which also raised the question of the constitutionality of the tolling statute, had been filed in the same district court and was pending at the time before the same judge.

Bendix conceded that Midwesco is an Illinois corporation with its principal place of business in Illinois. Midwesco is not authorized to do business in Ohio, maintained no corporate office or facility in Ohio and did not appoint an agent for service of process in Ohio.



On March 8, 1984, the District Court issued its decision in which it found that under Ohio law the only way that a foreign corporation such as Midwesco can appoint an agent for service of process within Ohio and thereby satisfy the tolling statute is by obtaining a license to do business in Ohio. (J.A. 20) The court thus held that the tolling statute violates the Commerce Clause and never reached Midwesco's additional argument that the tolling statute violates the Due Process Clause.

The District Court analyzed the tolling statute under both a *per se* test and a balancing test and held, under both standards, that it violates the Commerce Clause as applied to Midwesco. The court therefore granted Midwesco's motion for summary judgment inasmuch as the action was barred by the statute of limitations. Bendix never raised in the District Court the question of a contractual provision appointing an agent for service of process avoiding the effects of the tolling statute. Bendix also never raised in the District Court the question of the prospective application of the decision and the same was never considered by the court.

Bendix appealed the decision to the Court of Appeals which, in a decision reported at 820 F.2d 186, affirmed the District Court's decision granting Midwesco's motion for summary judgment. In so doing, the Court of Appeals agreed with the District Court and held that the only way a foreign corporation can satisfy the tolling statute is to obtain a license to do business in Ohio requiring the appointment of an agent for service of process, thus exposing the corporation to personal jurisdiction in the state courts. The Court of Appeals found this burden placed on foreign

corporations engaged in interstate commerce to be a *per se* violation of the Commerce Clause. The Court of Appeals considered, and found unpersuasive, Bendix's contention that the Court need not find the tolling statute unconstitutionally burdensome because foreign corporations can appoint an agent to receive process in Ohio without formally registering to do business in the state. Finally, the Court of Appeals refused to consider Bendix's argument, raised for the first time in its reply brief on appeal, that the District Court's ruling should be given only prospective effect.

—o—

## SUMMARY OF ARGUMENT

Midwesco, in Part I of its argument, establishes that the Ohio tolling statute is a forced licensure provision. In order for Midwesco to obtain a physical presence in Ohio to gain the benefits of the statute of limitations it must become licensed to transact business in Ohio requiring it to designate a statutory agent. By designating a statutory agent, Midwesco would submit itself to the general jurisdiction of the courts of Ohio for all purposes waiving its personal jurisdiction defenses and therefore its due process rights. This Court and other courts have long held such forced licensure provisions to impose an impermissible burden on interstate commerce. Midwesco sets forth several examples illustrating the pernicious effect of the statute upon interstate commerce. Midwesco also illustrates how the tolling statute discriminates against interstate commerce both by its language and its application. Even Bendix's argument proves this point. The minimum



contacts argument put forth by Bendix is shown to be baseless since the statute applies to all corporations engaged in interstate commerce. Furthermore once having appointed a statutory agent the question of minimum contacts is irrelevant since the corporation has submitted itself to the general jurisdiction of the Ohio courts. Even if the Court was to find that the statute applies evenhandedly, the burden on interstate commerce is not merely incidental and far outweighs any local benefits which could be served by a more narrowly drawn statute.

Midwesco demonstrates that even though the statute of limitations may be a privilege, Ohio may not impose upon it conditions requiring the relinquishment of Due Process rights—a waiver of personal jurisdiction. Furthermore, laches is proven not to be available as a defense to Midwesco under Ohio law, contrary to Bendix's assertion.

Part II evidences that under the Ohio statutory scheme, the sole means for a foreign corporation to designate an agent for service of process is by becoming licensed to transact business in Ohio. Since the parties did not include a provision appointing an agent in their contract the question as presented by Bendix is both speculative and waived. Additionally, such a provision would circumvent the Ohio statutory scheme and Midwesco could not be forced to agree to such a provision and waive its Due Process rights. Midwesco points out that the District Court in a companion case rejected Bendix's argument that the Ohio Secretary of State could simply have accepted a filing designating an agent. This argument was also rejected by the Court of Appeals in this case as well as the New Jersey Supreme Court under a similar statutory scheme. Even

the correspondence from the Ohio Secretary of State's office relied upon by Bendix fails to supports its position.

Part III argues that Bendix has waived the issue of the retroactive application of the District Court's deicision, having first raised it in its reply brief in the Court of Appeals. The District Court's decision should be applied retroactively since the holding of unconstitutionality was made in this very case and failure to do so would be contrary to this Court's decisions and would have a negative effect upon the legal profession.

———o———

## ARGUMENT

### I. THE TOLLING STATUTE IMPOSES AN IMPERMISSIBLE BURDEN ON INTERSTATE COMMERCE.

The Ohio tolling statute is a forced licensure provision. Compliance with it would have compelled Midwesco, and any other foreign corporation, to submit to personal jurisdiction in Ohio for all purposes. It is this forced licensure which places an impermissible burden on interstate commerce which this Court, and others, have never hesitated to strike down. The District Court and the Court of Appeals correctly held this forced licensure provision to be unconstitutional.

As they have done throughout this litigation, Bendix argues that the issues in this cause were already decided by this court in *G.D. Searle & Co. v. Cohen*, 455 U.S. 404 (1982). That is simply untrue. This Court in *Searle* merely held that the New Jersey tolling statute did not violate the



equal protection clause.[2] Bendix ignores the fact that the New Jersey statute in *Searle* was "examined under the Equal Protection Clause." *Id.*, 455 U.S. at 410. This Court did ***not*** apply the Commerce Clause test in *Searle*, which is a much more stringent test than the Equal Protection test which was applied. Contrary to Bendix's contention, nothing in either of the lower courts' decisions herein is in any way contrary to the *Searle* decision.

Both of the courts below relied upon the New Jersey Supreme Court's decision in *Coons v. American Honda Motor Co.* (*"Coons I"*), 94 N.J. 307, 462 A.2d 921 (1983), which held New Jersey's tolling statute, N.J.S.A. 2A:14-22, unconstitutional as violative of the Commerce Clause. Ironically *Coons I* is the culmination of this Court's remand in *Searle*, which Bendix is so fond of citing. The New Jersey statutes which were at issue in *Coons I* are practically identical to their Ohio counterparts presently before this Court: N.J.S.A. 2A:14-22 and Ohio Rev. Code § 2305.15 ((the tolling statutes); N.J.S.A. 14A:4-1 and Ohio Rev. Code § 1703.041 (statutory agents for corporations); and New Jersey Rule 4:4-4(c)(1) and Ohio Civil Rule 4.2(6) (service upon corporations).

Citing this Court's decisions in *Allenberg Cotton Company v. Pittman*, 419 U.S. 20 (1974), *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282 (1921), and *Sioux Remedy Co. v. Cope*, 235 U.S. 197 (1914), the *Coons I* court noted that a state cannot discriminate against a

---

[2] This Court did not hold that the New Jersey tolling statute did not violate both the Equal Protection Clause and the Due Process Clause as Bendix incorrectly states in footnote 1 of its brief.

foreign corporation engaged in interstate commerce merely because it has failed to qualify to do business in that state. The New Jersey Supreme Court recognized that there is no fundamental right to a statute of limitations defense but proceeded to hold:

> That legislative control, however broad, must be subject to constitutional limits. The legislature cannot accomplish indirectly that which it could not do directly; it cannot, in effect, force licensure on foreign corporations dealing exclusively in interstate commerce by otherwise preventing them from gaining the benefit of the statute of limitations defense. The burden thus imposed on interstate commerce is unconstitutional.

*Coons I*, 463 A.2d at 927. The Court thus held that the New Jersey tolling statute was a forced licensure provision which must be stricken as a *per se* violation of the Commerce Clause. It further found that the tolling statute would violate the Commerce Clause under a balancing analysis. *Coons I*, 463 A.2d at 926, n. 7.

The lower courts also relied upon the decision in *McKinley v. Combustion Engineering, Inc.*, 575 F.Supp. 942 (D.Ida. 1983), *affirmed in part, reversed in part*, 746 F. 2d 1486 (mem.unpub.) (9th Cir. 1984), involving Idaho Code § 30-509, a tolling statute. Under the Idaho statutory scheme, a foreign corporation doing business in Idaho was required to appoint an agent for process and thereby expose itself to personal jurisdiction in the state in order to obtain the benefit of the statute of limitations. The court found that the burden placed on foreign corporations "would clearly violate the Commerce Clause if the per se rule is employed" but declined to apply the rule based



upon its belief that § 30-509 only applied to firms doing business in Idaho and not to foreign corporations engaged exclusively in interstate commerce. *Id.*, 575 F.Supp. at 945. Applying the balancing test, the *McKinley* court found that by forcing foreign corporations to waive their personal jurisdiction defenses the statutory scheme placed a serious burden on interstate commerce. The court held that this burden on interstate commerce "was clearly excessive when compared to the benefits obtained by those statutes" and that any benefits to Idaho residents could be obtained through less onerous means. *Id.*, 575 F.Supp. at 948.

The Ninth Circuit's unpublished memorandum in *McKinley*, which is prohibited under Ninth Circuit Rule 21(c) from being cited as precedent within that Circuit, affirmed the District Court's decision dismissing the complaint as barred by the statute of limitations. The Court of Appeals, however, found that since § 30-509 did not apply where a foreign corporation could have been served with process under Idaho's long-arm statute and did not apply to corporations dealing exclusively in interstate commerce there was no waiver of personal jurisdiction. This is contrasted with the Ohio statutory scheme—which has been held to apply to a foreign corporation which could have ben served with process under Ohio's long-arm statute and to foreign corporations dealing in interstate commerce—which conditions the statute of limitations upon a waiver of personal jurisdiction defenses.[3]

---

[3] This points out the anachronism in Ohio law arising from subsequent court interpretations of the Ohio Supreme Court's decision in *Seeley v. Expert, Inc.*, 26 Ohio St. 2d

(Continued on following page)

Bendix mischaracterizes the decisions of both the District Court and the Court of Appeals in stating that they failed to analyze the tolling statute either in its general application or in relation to the facts in this case. Both courts undertook an analysis of the tolling statute and came to the same conclusion—that it violated the Commerce Clause.

The District Court recognized that this Court has applied two tests in analyzing whether a state statute violates the Commerce Clause—a *per se* test and a balancing test. The District Court agreed with the analysis in *Coons I* and *McKinley* and held that regardless of whether the tolling statute was analyzed under a *per se* test or a balancing test, as applied to Midwesco it violated the Commerce Clause. The Court found that under a *per se* test the tolling statute violated the Commerce Clause "by forcing interstate corporations to obtain a license in order to obtain the benefit of the statute of limitations defense." (J.A. 26) The Court further held that under the balancing test "the burden of having to obtain a license and therefore waiving a possible defense of lack of personal jurisdiction outweighs the benefits to potential litigants of making service of process easier to obtain on corporations engaged solely in interstate commerce." (J.A. 26-27) Since the Court found that the tolling statute violates the Commerce Clause it did not decide Midwesco's argument that the tolling statute also violates the Due Process Clause.



The Court of Appeals agreed with the District Court that the reasoning of *Coons I* and *McKinley* should be applied to this case. It held that the tolling statute forced a foreign corporation to choose between exposing itself to personal jurisdiction in the state courts by complying with the tolling statute and remaining liable in perpetuity for all lawsuits containing state causes of action by refusing to comply with the tolling statute. The Court of Appeals found "this burden placed on firms engaged exclusively in interstate commerce to be a *per se* violation of the commerce clause." 820 F.2d at 188.

Bendix spends numerous pages discussing what the tolling statute supposedly is not about, but never addresses the central question of what the statute is—a forced licensure provision.[4]

---

(Continued from previous page)

61, 269 N.E.2d 121 (1971). As a result of *Seeley*, Ohio may very well be the sole state which still holds that a foreign corporation engaged in interstate commerce which is subject to long-arm jurisdiction is not considered to be physically present in the state for purposes of the tolling statute. See, e.g., *Bancorp Leasing and Financial Corp. v. Agusta Aviation Corp.*, 813 F.2d 272, 274-275 (9th Cir. 1987) (containing a compendium of cases holding that a tolling provision does not apply where a foreign corporation is amenable to service under a long-arm statute.) But for this holding the present issues would be moot inasmuch as Midwesco would have received the protection of the statute of limitations and fallen outside the scope of the tolling statute since Midwesco was certainly present in Ohio for purposes of long-arm jurisdiction. (It supplied a boiler system in Ohio) In fact, this was the initial argument raised by Midwesco in support of summary judgment in the District Court which was rejected. It is also quite possible that the Supreme Court of Ohio, if faced with this question, would hold that Midwesco was "present" in the state. But the District Court was required to follow *Seeley* and its progeny.

[4] While the tolling statute might have some salutary purposes such as tolling the statute of limitations as to those who have absconded from the state, as applied to foreign corporations engaged in interstate commerce, these purposes are non-existent.

This Court has held forced licensing provisions to be *per se* violations of the Commerce Clause in broadly worded opinions. Justice Potter, in his opinion concurring in part and dissenting in part in *Searle* in which Chief Justice Berger joined, found that the Commerce Clause challenge has considerable force citing *Allenberg Cotton Co. v. Pittman. Searle*, 455 U.S. at 419-420. In *Allenberg Cotton Co.* this Court held that even though plaintiff was doing business in the State of Mississippi its contacts with the state were interstate in character so the state could not require plaintiff to become licensed to do business as a prerequisite to using its courts. This Court in *Dahnke-Walker v. Bondurant*, 257 U.S. at 291, in holding a statute unconstitutional which rendered a contract made by a foreign corporation unenforceable because of the corporation's failure to become licensed to transact business, stated:

> A corporation of one state may go into another, without obtaining the leave or license of the latter, for all the legitimate purposes of such commerce; and any statute of the latter State which obstructs or lays a burden on the exercise of this privilege is void under the commerce clause.

An analougous statutory scheme faced this Court in *Sioux Remedy Co. v. Cope*, 235 U.S. 197 (1914). The statute required that in order to maintain a suit in the courts of the state one must become licensed to transact business in the state, must appoint a resident agent upon whom process may be served in any action to which it may be a party and must pay the filing and recording fee. As far back as 1914 this Court found that the requirement of appointing a resident agent for service of process is particularly burdensome since it required the corporation to



subject itself to the jurisdiction of the courts of the state in general:

> The second one, respecting the appointment of a resident agent upon whom process may be served, is particularly burdensome, because, as the Supreme Court of the State has said, it requires the corporation to subject itself to the jurisdiction of the courts of the State in general as a prerequisite to suing in any of them; that is to say, it withholds the right to sue even in a single instance *until the corporation renders itself amenable to suit in all the courts of the State by whosoever chooses to sue it there. If one State can impose such a condition others can, and in that way corporations engaged in interstate commerce can be subjected to great embarrassment and serious hazards in the enforcement of contractual rights directly arising out of and connected with such commerce.* As applied to such rights we think the conditions are unreasonable and burdensome, and therefore in conflict with the commerce clause.

*Id.*, 235 U.S. at 205. (Emphasis added)

A similar statutory scheme also faced this Court in *International Textbook Co. v. Pigg*, 217 U.S. 91 (1910), in which this Court found that the statute imposed a condition upon a foreign corporation seeking to do business in the state and as such was "a regulation of interstate commerce and directly burdens such commerce. The State cannot thus burden interstate commerce." *Id.*, 217 U.S. at 111.

This is exactly the same effect that the tolling statute presently before this Court has—it requires Midwesco to subject itself to the general jurisdiction of the courts of the State of Ohio in order to avoid its application. As the District Court correctly pointed out, by appointing a statu-

tory agent pursuant to Ohio Rev. Code § 1703.041, Midwesco would waive any future defenses of lack of personal jurisdiction[5]. This is because the courts of Ohio are courts of general jurisdiction and personal service upon Midwesco's Ohio statutory agent would give the court jurisdiction over all transitory causes of action. *Perkins v. Benguet Consolidated Mining Co.*, 158 Ohio St. 145 (1952); *Mattone v. Argentina*, 123 Ohio St. 393 (1931); *Firestone Tire & Rubber Co. v. State Farm Mutual Automobile Ins. Co.*, 119 OhioApp. 116, 197 N.E.2d 379 (1963).

A simple example demonstrates the pernicious effect upon Midwesco. One of Midwesco's divisions is a preinsulated pipe company. Pipe fitters and welders travel throughout the country to install Midwesco's pipe. If a pipe fitter or welder who fortuitously happens to be an Ohio resident is injured on a Midwesco project in Florida he could then file suit against Midwesco in Ohio since Midwesco would have designated a statutory agent for service of process and thereby subjected itself to suit in Ohio for *all purposes*, even though it has no offices, nor does it do business in Ohio generally. Examples such as this abound —we live in a highly transient society with corporations

---

[5] Under the Ohio Foreign Corporation Act, Ohio Rev. Code § 1703.02, Midwesco, as a corporation engaged in Ohio solely in interstate commerce would not normally have to appoint a statutory agent under § 1703.041 in order to transact business in Ohio. Section 1703.02 specifically excludes from the coverage of § 1703.041 corporations installing machinery or equipment sold by them in interstate commerce. Section 1703.02 does *not*, however, exclude the application of the tolling statute to corporations engaged solely in interstate commerce like Midwesco.



and individuals continually doing business interstate and internationally. The evils and burdens of forced licensure —recognized by this Court as long ago as 1914—increases immensely with this burgeoning of commerce.

Bendix prefers to ignore the foregoing cases except to reiterate Chief Justice Rehnquist's dissent from this Court's denial of certiorari from the decisions of the New Jersey Supreme Court in the *Coons* litigation. *Honda Motor Company, Ltd. v. Coons*, 469 U.S. 1123 (1985). At bar, the tolling statute's impact on interstate commerce is not "fairly negligible." To the contrary, the impact can be quite great as exemplified by the fact that this issue is presently before the Court in two separate matters. *See also, Copley v. Heil-Quaker Corp.*, Supreme Court No. 87-170. Moreover, as demonstrated, forcing foreign corporations to remain liable in perpetuity unless they become licensed to do business in the State of Ohio and appoint a statutory agent for service of process is certainly not a negligible impact. Myriad of examples can be cited as to the practical effect on commerce. Would bonding companies issue bonds on construction projects such as these if their principal, and therefore they themselves, remained liable in perpetuity? Likewise, contractors, architects, engineers, etc., would not want to undertake a project in a foreign state if they are subject to jurisdiction for all purposes. Principals and bond companies would be forced to defend lawsuits throughout the country in forums which may have no relationship with the particular project in question or the principal's place of business.

This Court's decisions in the forced licensure cases are not so narrowly worded as Bendix perceives. The de-

cisions, as noted above, do not turn solely upon the fact that failure to become licensed barred the corporations from the state courts. The holdings are much broader than that and clearly emcompass the factual situation with which this Court is presently faced.

Bendix also refers to the supposed availability of the defense of laches. As correctly pointed out by Justice Stevens in his dissent in *Searle*, "there are material differences between laches—which requires the defendant to prove inexcusable delay and prejudice—and the bar of limitations, which requires no such proof." *Searle*, 455 U.S. at 420-421. Additionally, in Ohio laches is available only in equitable actions and only where the action is not governed by a statute of limitations. *Thropp v. Bache Halsey Stuart Shields, Inc.*, 650 F.2d 817, 822 (6th Cir. 1981); *Woodrum v. Abbott Linen Supply Co.*, 428 F.Supp. 860, 862 (S.D.Ohio, 1977). Since the present cause is an action at law which is governed by its own statute of limitations laches would not be available to Midwesco in Ohio.

Bendix also points out that the protection of statutes of limitations is not a fundamental or natural right. But Midwesco has never claimed that it is. Additionally, such a determination is unnecessary in order to find a violation of the Commerce Clause. All that is required is that the tolling statute discriminates against foreign corporations engaged in interstate commerce by conditioning the coverage of the statute of limitations upon their becoming licensed to transact business in Ohio. It has long been established by this Court that a state may not impose, even upon a privilege, conditions requiring the relinquishment of a



constitutional right. *Western & Southern Life Insurance Co. v. State Board of Equalization*, 451 U.S. 648, 657-658 (1981); *Sherbert v. Verner*, 374 U.S. 398, 404-405 (1963); *Frost & Frost Trucking Co. v. Railroad Commission of California*, 271 U.S. 577, 593-594 (1926); *Terral v. Burke Construction Co.*, 257 U.S. 529, 532 (1922). Here, Ohio seeks to condition the protection of the statute of limitations upon Midwesco's relinquishing its Due Process rights —a waiver of personal jurisdiction. *Chase Securities Corp. v. Donaldson*, 325 U.S. 304 (1945), cited by Bendix, is inapposite. This Court in *Chase* merely held that the lifting of a statute of limitations restoring a remedy lost through the passage of time is not a *per se* violation of the Fourteenth Amendment. It did not hold that a state may condition the statute of limitations so as to discriminate against and unduly burden interstate commerce.

Without any support, Bendix makes the bold statement that the tolling statute does not discriminate against interstate commerce. (Bendix brief, p. 9) This flies in the face of the language of the statute. *Only foreign corporations* engaged in interstate commerce are required to appoint a statutory agent by becoming licensed to transact business in order to avoid the tolling of the statute of limitations. Only by ignoring both the language and application of the tolling statute can Bendix conclude that it is nondiscriminatory and regulates evenhandedly.

Dealing in pure speculation, Bendix argues that a significant and presumably sizeable portion of interstate commerce is unaffected by the tolling statute. Presumably this consists of foreign corporations engaged in interstate commerce who are beyond the reach of the Ohio courts due

to a lack of minimum contacts. (Bendix brief, p. 12-13) But Bendix's minimum contacts argument is irrelevant because it overlooks a key fact—that the tolling statute applies to *all* foreign corporations engaged in interstate commerce regardless of whether or not they have the necessary minimum contacts with Ohio. The tolling statute by its language applies to all unlicensed foreign corporations inasmuch as it only exempts those corporations which can be personally served with process in Ohio. Nothing in the tolling statute exempts foreign corporations which lack the necessary minimum contacts. It requires all foreign corporations—even those lacking minimum contacts—to become licensed to do business and thus waives their personal jurisdiction defenses as a condition to obtaining the benefit of the statute of limitations. Foreign corporations engaged in interstate commerce which lack minimum contacts, by appointing a statutory agent for process, waive personal jurisdiction. Justice Powell noted this in his opinion in *Searle*. *Searle*, 455 U.S. at 419, n. 5. By once having appointed an agent pursuant to Ohio Rev. Code § 1703.041 there is no longer a concern with minimum contacts since the corporations will have submitted themselves to the general jurisdiction of the courts of Ohio. *Neirbo Co. v. Bethlehem Shipbuilding Corp., Ltd.*, 308 U.S. 165, 175 (1939); *Pennsylvania Fire Insurance Co. v. Gold Issue Mining and Milling Co.*, 243 U.S. 93, 95 (1917).

Bendix's argument presupposes that foreign corporations engaged in interstate commerce are going to inherently know whether or not they have met the necessary minimum intrastate contacts to establish jurisdiction in Ohio. That is something which the Ohio courts can only determine on a case-by-case basis. Long before this issue



would be decided by the courts, foreign corporations engaged in interstate commerce will have been faced with the choice of waiving personal jurisdiction or remaining liable in perpetuity on state causes of action.

Based upon this fallacy, Bendix proceeds to categorize the parties allegedly affected by the tolling statute. It is indeed ironic that Bendix, by its own erroneous breakdown of those affected by the tolling statute, demonstrates that the statute discriminates against interstate commerce. Bendix's category I consists of intrastate actors not servable in Ohio which according to Bendix includes Ohio corporations and domesticated foreign corporations which have abandoned intrastate activities. However, Ohio corporations and domesticated foreign corporations, as a prerequisite of doing business in Ohio, had already designated agents in Ohio for purposes of process. Bendix even concedes that this category only involves intrastate commerce.

As already illustrated, the tolling statute does not distinguish between Bendix's categories No. II (interstate actors beyond the reach of the Ohio courts on Due Process grounds) and No. III (interstate actors subject to Ohio's long-arm jurisdiction). Bendix admits that category No. III is affected by the unconstitutional burden on interstate commerce. But since the tolling statute does not distinguish between categories No. II and No. III both categories are unconstitutionally burdened. As Bendix concedes, since category No. I consists of intrastate actors its members are untouched by the pernicious effect of being forced to become licensed in Ohio and designate a statutory agent. What is clear is that it is *only* foreign corporations engaged in interstate commerce who are discriminated

against by being forced to become licensed to transact business in the State of Ohio to gain the benefits of the statute of limitations. The tolling statute thus discriminates against foreign corporations engaged in interstate commerce and does not regulate evenhandedly.

Bendix next makes the untrue contention that foreign corporations engaged in interstate commerce subject to Ohio long-arm jurisdiction have accepted a larger burden on their intrastate dealings than anything resulting from the tolling statute. A foreign corporation engaged solely in interstate commerce which subjects itself to the long-arm jurisdiction of Ohio does so *only* in connection with that particular matter arising in Ohio by which it established such jurisdiction. Compare that with the effect of the tolling statute which requires the foreign corporation to become licensed in Ohio. In order to become so licensed the corporation must maintain a statutory agent, Ohio Rev. Code § 1703.041, which subjects the corporation to the general jurisdiction of the courts of Ohio for any and all matters over which the courts have jurisdiction. This would include claims against Midwesco which are unrelated to Ohio. The Due Process Clause would normally prohibit any such attempted claim of jurisdiction by the courts of Ohio. *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). The tolling statute, by conditioning the benefits of the statute of limitations upon the appointment of a statutory agent within Ohio thus forces Midwesco to surrender its Due Process rights.

Should this Court for some reason find the tolling statute to regulate evenhandedly, it is still unconstitutional inasmuch as the effects on interstate commerce are not merely incidental and far outweigh the local benefits. *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). Despite the fact that nowhere in its brief does it discuss the alleged state interests, Bendix jumps to the conclusion that those unstated interests are genuine and compelling. (Bendix brief, p. 21) Bendix's means of dealing with this issue is to merely argue that valid state interests have been conclusively established in the *Searle* opinion. But the *Searle* case was an equal protection case. No matter how much Bendix attempts to ignore this distinction, the test applied under an equal protection argument where there is no invidious classification or fundamental right is simply whether the statute is rationally related to the achievement of legitimate governmental ends. Such a test is much less stringent than the balancing test applied on a Commerce Clause question. The *Coons I* court recognized that *Searle* applied "the less rigorous equal protection standard." *Coons I*, 463 A.2d at 926. The *Searle* court merely found that "rational reasons support tolling the limitation period for unrepresented foreign corporations." *Searle*, 455 U.S. at 410. There was no balancing by this Court in *Searle* of the burden imposed on interstate commerce as against the local benefits.

As confirmed by Bendix in its brief, the sole local interest protected by the tolling statute is the alleged ease with which a plaintiff can sue a defendant present within the state as contrasted with one subject to Ohio's long-arm jurisdiction. Bendix, however, knew Midwesco's address at all relevant times. There was never a claim by Bendix that it was unable to locate or serve Midwesco under the Ohio long-arm Statute. It should also be noted that service

of process under the long-arm provision is no more difficult than obtaining service within the State of Ohio since Ohio Civil Rule 4.3(B) specifically provides for service by certified mail and sets out a simple and definite procedure for obtaining such service.

Compare this with the burden that the tolling statute places upon Midwesco. In order for Midwesco to become licensed to transact business it must appoint a statutory agent. As already established, by doing so Midwesco subjects itself to the general jurisdiction of the courts of Ohio for all transitory causes of action and waives its Due Process rights.

The tolling statute's burden on interstate commerce is further accentuated by the fact that it postpones the running of the statute of limitations in perpetuity. The tolling statute does not toll the running of the statute of limitations solely during the period in which a plaintiff could not reasonably have located and served the foreign corporation, but rather tolls it for decades. Whatever limited local interest may be served by the tolling statute with respect to parties evading service could easily be accomplished by a more narrowly drawn statute.

This matter arises solely as a result of anachronistic interpretations of the tolling statute following *Seeley* in which Ohio courts have held that being subject to long-arm jurisdiction in Ohio does not constitute physical presence in the state for purposes of the tolling statute. (If they did so hold, Midwesco would have had the benefit of the statute of limitations.) As a result of this anachronism, Bendix urges this Court to embrace a pernicious doctrine—one that would turn back the clock on a long line of cases



holding that forced licensure provisions such as this are unconstitutional violations of the Commerce Clause and that a statute cannot condition a privilege upon the relinquishment of a constitutional right. By accepting Bendix's position this Court would sanction, and indeed encourage, states to pass specific legislation to accomplish directly that which the tolling statute does indirectly—conditioning the benefit of the statute of limitations to foreign corporations engaged in interstate commerce upon becoming licensed to transact business in the state. Such legislation would seriously damage the way foreign corporations transact business. If they elected to engage in interstate commerce in such states they would be faced with the dilemma of choosing between being liable in perpetuity for all state causes of action or relinquishing their Due Process rights. Nothing presented by Bendix justifies such a result, nor reversing the lower courts' holdings that the tolling statute is unconstitutional.

## II. MIDWESCO COULD NOT HAVE APPOINTED AN AGENT FOR SERVICE OF PROCESS WITHOUT SUBJECTING ITSELF TO THE GENERAL JURISDICTION OF THE COURTS OF THE STATE OF OHIO.

Bendix again attempts to contrast the decision of the lower courts herein with the *Searle* decision by mischaracterizing *Searle*. Bendix contends that the majority in *Searle* considered it inappropriate to decide the issue of the burden on commerce without authoritative information on the means available under New Jersey law for avoiding the adverse consequences of the statute. Bendix prefers to ignore the fact that this Court remanded *Searle* for, among other reasons, a determination whether under

New Jersey law a foreign corporation could avoid the tolling statute without having to become licensed to do business in the state solely because of what was perceived as an ambiguity in a footnote in the New Jersey Supreme Court's decision in *Velmohos v. Maren Engineering Corp.*, 83 N.J. 282, 416 A.2d 372 (1980). In so doing, Bendix quotes *Searle* totally out of context on Page 22 of its brief —the quote is from the Court's statement of the respondent's position and did not represent the Court's position.

No such ambiguity exists in Ohio law as this Court in *Searle* felt existed in New Jersey. Furthermore, the District Court herein had the additional advantage of the New Jersey Supreme Court's decision in *Coons I* and, contrary to Bendix's contention, did review Ohio law on this question. The District Court's decision proves that, despite Bendix's unsupported assertion, Bendix did not make a strong showing that alternative appointment procedures existed in Ohio.

## A. THE APPOINTMENT OF AN AGENT FOR PROCESS WITHIN THE CONTRACT WOULD HAVE BEEN VIOLATIVE OF THE STATUTORY SCHEME.

Bendix claims that Midwesco could have obviated the burden on interstate commerce by appointing an agent for service in the contract between the parties. It must be pointed out that this specific issue was never raised by Bendix in the District Court and was therefore waived.

As Bendix correctly points out, this argument was raised before the Court of Appeals (albeit for the first time) and rejected by it as follows:

> While we acknowledge that Midwesco could have chosen to name an agent as part of its contract with Bendix, this fact alone in no way solves the problem of whether the tolling statute violates the commerce clause.



820 F.2d at 189. There is nothing perplexing in this statement as Bendix suggests. The Court of Appeals merely recognized the fact that Bendix and Midwesco did not include such a provision in their contract and the Court would therefore not decide a speculative issue. There being no such provision in the contract the Court of Appeals still had to analyze the question of whether the tolling statute violated the Commerce Clause within the statutory scheme. Bendix's self-serving speculation as to what the Court of Appeals meant by the aforesaid statement is baseless and without any foundation in the opinion itself.

Bendix attempts to distinguish the present cause from both *Searle* and *Coons I* on the basis that they were tort claims and this is a contract claim. In fact, any such distinction is irrelevant as evidenced by the fact that this same issue was dealt with by Justice Potter's opinion in *Searle* and was fully addressed in *Coons I*.

The question in *Coons I* was raised in the context of New Jersey Rule 4:4-4(c)(1) which is the relevant rule regarding service upon a corporation in New Jersey and which is practically identical to Ohio Civil Rule 4.2(6). Analyzing the question within the statutory scheme, the New Jersey Supreme Court held that a foreign corporation could not merely appoint an agent for service of process in New Jersey rather than registering to do business there. In so holding, the Court also found that the New Jersey Rule did not provide an independent basis for the designation of an agent to accept service but merely di-

rected service on a person so designated. *Coons I*, 463 A.2d at 924.

Justice Powell, in his opinion in *Searle*, also reviewed the issue within the context of the statutory scheme. Upon reviewing the New Jersey statutes he concluded "that foreign corporations may designate an agent for service of process only by obtaining a certificate of authority to do business." *Searle*, 455 U.S. at 419. Justice Powell reached this conclusion despite New Jersey Rule 4:4-4(c)(1) which has identical language to Ohio Civil Rule 4.2(6). The reason for this is that "statutory authority is necessary" to authorize the appointment by a corporation of an agent for service. *Id.* at 418. Similarly, under Ohio's statutory scheme the only way that a foreign corporation can designate an agent for process is by becoming licensed to transact business in Ohio. Ohio Rev. Code § 1703.041.

Just as in *Coons I* and even *Searle*, the present matter must be viewed within the Ohio statutory scheme. In order to be personally served in Ohio to satisfy the tolling statute, Midwesco, as a corporation, would have to maintain a place of business in Ohio, station an officer or managing or general agent in Ohio, or appoint an agent in Ohio for service of process. Ohio Civil Rule 4.2(6). Midwesco, as an Illinois corporation engaged in interstate commerce, could not, under the Commerce Clause, be required to move to, or maintain a place of business in Ohio. Similarly, Ohio could not require Midwesco to station an officer or managing or general agent in Ohio. Such conditions upon Midwesco's engaging in interstate commerce in Ohio would be a *per se* violation of the Commerce Clause. Bendix has recognized this fact throughout the litigation and does not dispute it.



What remains is the appointment of an agent to receive service of process. Ohio Civil Rule 4.2(6) is not an enabling statute setting forth an independent basis for the appointment of an agent, even though Bendix interprets it as such. Ohio Civil Rule 4.2(6) merely directs service on those indixiduals designated therein. Under Ohio law, the *sole* statutory provision by which a foreign corporation can appoint an agent in Ohio for service of process is Ohio Rev. Code § 1703.041 which is part of the procedure whereby a foreign corporation becomes licensed to transact business in Ohio. But requiring Midwesco to take out a license to do business in order to engage in interstate transactions in Ohio also constitutes a *per se* violation of the Commerce Clause.

Bendix cites absolutely no statutory support for its contention that the parties could merely have contractually designated an agent. Additionally, this flies in the face of Ohio Rev. Code § 1703.041. Bendix's contention would permit a foreign corporation to easily circumvent § 1703.041 by establishing a presence through the designated agent without becoming licensed to do business. This is totally contrary to the Ohio Foreign Corporations Act which requires a foreign corporation, in order to have a presence in the state as required by the tolling statute, to become licensed to transact business including the designation of a statutory agent under § 1703.041. In fact, this is even recognized by the opinion of Patricia Mell of the Ohio Secretary of State's office which Bendix improperly relies upon:

> Before a foreign corporation can establish a presence in Ohio, it must apply for a license and concurrently designate an agent. The designation of an agent with-

> out a license would, on its face, be an attempt by the corporation to acquire a presence in Ohio without the attendant formality of licensure.

(J.A. 49)

As Bendix itself concedes, the contract between Bendix and Midwesco did not include a provision appointing an agent for process. As such, Bendix's entire argument is speculative and therefore improperly raised. It should be noted that throughout its brief Bendix argues conjecture as an appropriate basis upon which to dismiss the lower courts' decisions. Despite the existence of identical statutory language in New Jersey, there is no support for Bendix's position in either *Searle* or *Coons I* inasmuch as there was no such contractual provision in existence in either of those cases. Additionally, such a provision in a contract would be for Bendix's benefit and therefore should have been included at its behest. Having failed at the appropriate time to seek to have such a provision included in its contract, Bendix now seeks improperly to have this Court reform the contract in order to gain the benefit of its own failings. *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St. 2d 241, 374 N.E.2d 146, 150 (1978).

The inclusion of such a provision in the contract would have caused Midwesco to waive its Due Process rights. While a person can waive his constitutional rights, he cannot be forced to enter into a provision waiving those rights. *Byers v. Meridian Printing Co.*, 84 Ohio St. 408, 95 N.E. 917, 919 (1911). But that is exactly what Bendix proposes—that Midwesco be punished because it did not accede to such a provision in its agreement with Bendix waiving its Due Process rights. The parties, however, did



not include such a provision in their contract indicating that no such rights were being waived. Midwesco, not having waived any of its constitutional rights, has been seeking the protection of those rights throughout this litigation. If foreign corporations engaged in interstate commerce were forced to contractually designate an agent for process as Bendix proposes, they would waive their personal jurisdiction defenses and Due Process rights. Bendix's argument would merely provide it with a way of circumventing the tolling statute which has been held unconstitutional, because it would have the same ultimate effect as the statute.

Bendix cites Ohio Civil Rule 4.2(6) as the basis for its belief that Midwesco need only have contractually designated an agent instead of having complied with the provisions of the Ohio Foreign Corporations Act. However, Bendix cites no statutory provisions and no cases supporting its contention. Instead, it argues that the Federal Rules of Civil Procedure are often used by Ohio courts to explain the Ohio Rules of Civil Procedure and in support thereof cites several cases, none of which involve the statutory provision in question. *Maryhew v. Yova*, 11 Ohio St.3d 154, 464 N.E.2d 538 (1984), involved the presentation and waiver of affirmative defenses under Ohio Civil Rule 12. At issue in *City of Willoughby Hills v. Cincinnati Insurance Co.*, 9 Ohio St.3d 177, 459 N.E.2d 555 (1984) was the application of notice pleading under Ohio Civil Rule 8. Bendix also incorrectly cites *Fancher v. Fancher*, 8 OhioApp.3d 79, 455 N.E.2d 1344 (1982). Contrary to Bendix's statement, nowhere in *Fancher* does the court rely upon federal precedent to interpret Ohio Civil Rule 4. The only time that the court cites any fed-

eral precedent is in conjunction with a discussion of notice pleading under Ohio Civil Rule 8.

None of the cases cited by Bendix for the proposition that under Federal Rule of Civil Procedure 4 a corporation can appoint an agent to receive process in fact stands for that proposition. None of Bendix's cases hold that Federal Rule 4 provides an independent basis for the designation of an agent to receive service of process. In fact, three of the cases cited by Bendix in support of its proposition nowhere even mention Federal Rule 4—*Kenny Construction Co. v. Allen*, 248 F.2d 656 (D.C.Cir. 1957); *National Acceptance Co. of America v. Wechsler*, 489 F.Supp. 642 (N.D.Ill. 1980); and *Emerson Radio & Phonograph Corp. v. Callander Distributing Corp.*, 116 F.Supp. 926 (S.D.N.Y. 1953). The fourth case cited by Bendix, *Apex Pool Equipment Corp. v. Venetian Pools, Inc.*, 52 F.R.D. 48 (S.D.N.Y. 1971), merely discusses the fact that the *individual* defendants designated an authorized agent who could be served under Federal Rule 4. In contrast to this is the New Jersey Supreme Court's decision in *Coons I*. There, when faced with the identical statutory scheme, the court held that a foreign corporation could not merely designate an agent as Bendix suggests.

Bendix also misrepresents the holding of *Trueblood v. Grayson Shops of Tennessee, Inc.*, 32 F.R.D. 190 (E.D. Va. 1963). The court in *Trueblood* merely stated that a fully empowered and authorized agent of the defendant could designate a person as agent upon whom service of process could be effectuated even before that person was appointed a registered agent of the defendant. The case has no relevance to any of the issues before this Court.



## B. AN AGENCY APPOINTMENT WOULD NOT HAVE BEEN ACCEPTED FOR FILING BY THE OHIO SECRETARY OF STATE.

Once again Bendix misinterprets *Searle* by arguing that the Court of Appeals disregarded the teaching of *Searle*. That which Bendix contends is the teaching of *Searle* is simply not. The Court of Appeals confronted this argument and rejected it. The District Court could not confront the argument since it was never raised by Bendix although it was raised by plaintiffs in the case of *Copley v. Heil-Quaker Corp., supra.*

In its futile attempt to find support for its position Bendix turns to Ohio Rev. Code § 111.6 which simply provides that the Secretary of State shall charge and collect a $5.00 fee for filing any certificate or paper not required to be filed. Bendix contends that this section authorizes a corporation to file with the Ohio Secretary of State notice designating an agent to accept service of process without registering to do business. This is incorrect and without any basis at all.

Bendix fails to point out that this issue was raised and rejected in *Coons I*. There, plaintiffs relied upon N.J.S.A. 14A:1-6(4) which provides that the Secretary of State shall record all documents which relate to corporations and which are required or permitted to be filed in his office. The court in *Coons I* noted that the New Jersey Secretary of State "has acceded to the Attorney General's contrary position that in accordance with N.J.S.A. 14A:1-6(4) and N.J.S.A. 2A:14-22, a foreign corporation may file with the Secretary of State a notice designating a representative in New Jersey as its agent to accept service of

process." *Coons I*, 463 A.2d at 925.[6] The court in *Coons I* rejected the position of the New Jersey Secretary of State and the New Jersey Attorney General and held that inasmuch as no statute or rule "authorizes the designation of an agent without registering to do business in the state, we conclude that a foreign corporation cannot file with the Secretary of State notice designating a representative as its agent to accept service of process under N.J.S.A. 14A:1-6(4)." *Id.*, 463 A.2d at 925.

Bendix next refers to correspondence received by counsel in the *Copley v. Heil-Quaker Corp.* case from the Ohio Secretary of State's office. As Bendix concedes, these letters were never filed in this case and never became part of the record in this case.[7] There was no common record in the two cases as alluded to by Bendix. All that occurred was that arguments were heard during a single hearing but the arguments in the respective cases were not commingled as the District Court first heard the arguments of counsel in *Copley* followed by counsels' arguments in the instant cause.

Bendix's concession that Patricia Mell's December 22, 1983 letter is "inconclusive" is an understatement. Ms.

---

6 This represented a deviation from the New Jersey Secretary of State's position at the time of *Searle* inasmuch as the *Searle* record included an opinion from the Secretary of State that the registration statute was the only means of designating an agent for service of process.

7 These letters, even though placed in the joint appendix by Bendix, not having been presented to the District Court and not being part of the records on appeal cannot be considered by this Court. *United States v. Dreike*, 707 F.2d 978, 983 (8th Cir. 1983); *Petitions of Rudder*, 159 F.2d 695 (2nd Cir. 1947).



Mell states in no uncertain terms that the Secretary of State would *not* in the ordinary course of business accept a designation of an agent from a foreign unlicensed corporation. The letter then opined that under the Ohio corporations law there was nothing either prohibiting or requiring the Secretary of State to accept such a designation if a "thorough investigation" established that the unlicensed foreign corporation was strictly interstate in nature. (J.A. 48) Nowhere does her letter even state how such an investigation might be carried out. The letter did not even state whether or not the Secretary of State would accept such a designation following such an investigation. (J.A. 49)

Bendix conveniently ignores the fact that this issue was considered and dealt with in length by the District Court in *Copley*, which was the only one of the two cases in which it was actually raised. Judge Potter thoroughly rejected Bendix's argument in *Copley:*

> The Court finds no merit to plaintiffs' argument. The Court agrees with the New Jersey Court that the mere fact that the Secretary of State can accept a document for filing does not independently authorize the filing of such a document. Any scheme which would permit a corporation engaged solely in interstate commerce to designate an agent for service of process purposes should be enacted by the legislature. Therefore, the Court finds the opinion which plaintiffs obtained from Patricia Mell, Corporations Counsel for the Secretary of State, dated December 22, 1983, to be unpersuasive. As defendant Heil-Quaker points out, under existing Ohio law it is not practicable or realistic to speculate that a corporation engaged in interstate commerce might surmise that the Secretary of State after thorough investigation might

accept the designation of an agent from a corporation which is not registered to do business in Ohio.

(J.A. 42)

The District Court in *Copley* also noted that the Secretary of State's opinion had changed during the course of the litigation, citing Patricia Mells' letter dated September 14, 1983 in which she stated that, "Pursuant to Section 1703.041 O.R.C., the Ohio Secretary of State may accept for filing a designation of statutory agent only for those foreign corporations which are duly licensed to transact business within the State." (J.A. 43)

The Court of Appeals in the instant cause, faced with the same issue, concurred with the reasoning of the District Court in *Copley* and stated that "this argument is highly speculative and devoid of any statutory support." 820 F.2d at 189.

Bendix wrongly states that the Court of Appeals incorrectly viewed the burden of proof by placing the same upon Bendix with respect to the applicability of Ohio Rev. Code § 111.6. Contrary to Bendix's contention, the burden was upon it to establish that the statute in fact is an enabling statute as it contends. Furthermore, this Court has long established that once discrimination against commerce is demonstrated the burden falls on the party defending the validity of the statute "to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake." *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979); *Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333, 353 (1977).



The tenuousness of Bendix's argument is demonstrated by its attempt on Page 29 of its brief to rewrite the opinions of both the District Court and the Court of Appeals. Contrary to Bendix's assertion, Patricia Mell's December 22, 1983 letter does not state the practices and policies actually in effect at the Secretary of State's office but rather consists of speculation as evidenced by the wording of the letter and as correctly found by both the District Court in *Copley* and the Court of Appeals herein. Furthermore, as exemplified by the New Jersey Supreme Court's decision in *Coons I*, the courts are in no way bound by such opinions of the Secretary of State's office. Bendix's sheer speculation as to what influenced the District Court and the Court of Appeals is so devoid of any factual basis as to not even justify a response.

## III. THE DISTRICT COURT CORRECTLY APPLIED ITS DECISION RETROACTIVELY.

Bendix, obviously cognizant of the fact that it has no justifiable response to its failure to raise the issue of retroactivity either before the District Court or in its opening brief in the Court of Appeals, tries to make short shrift of it on the final page of its brief. Bendix prefers to ignore the issue and seeks to have the Court overlook a major transgression by Bendix in raising the issue for the first time in its reply brief in the Court of Appeals—it was never even mentioned in the District Court. This is not the only impediment to the prospective application of the District Court's decision, as Bendix contends, but it certainly is the first impediment and one which Bendix cannot overcome.

The Court of Appeals, faced with the issue of the retroactivity of the ruling, refused to consider it as a result of the fact that it was raised by Bendix for the first time in its reply brief. 820 F.2d at 189. In so doing, the Court cited *Thompson v. Commissioner of Internal Revenue*, 631 F.2d 642, 649 (9th Cir. 1980). The Court's decision is based upon a long established rule for which the number of supporting citations are legion.[8]

Furthermore, the decision holding that the tolling statute is an unconstitutional violation of the Commerce Clause was issued by the District Court in this very case. The District Court's ruling must be applied in this case to avoid the bar against constitutional adjudications standing as mere dictum. *Stovall v. Denno*, 388 U.S. 293, 301 (1967); *Valdez v. Perini*, 474 F.2d 19, 21 (6th Cir. 1973). None of the cases cited by Bendix involves a holding of unconstitutionality in that very case. Even in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) the question was not whether the decision in that very case should be applied retroactively to the case itself. Rather, the question was whether the rule of law announced in *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1968), should be applied retroactively to the *Chevron Oil* litigants. The actual parties in *Rodrigue* did get the benefit of their actions inasmuch as the decision

---

[8] *E.g., Ash v. Board of Education of the Woodhaven School District*, 699 F.2d 822, 827 (6th Cir. 1983); *Duval Corp. v. Donovan*, 650 F.2d 1051, 1054 (9th Cir. 1981); *McCall v. Andrus*, 628 F.2d 1185, 1187 (9th Cir. 1980); *Roberts v. Berry*, 541 F.2d 607, 610 (6th Cir. 1976); *Compton v. Tennessee Department of Public Welfare*, 532 F.2d 561, 563 n. 1 (6th Cir. 1976); *Finsky v. Union Carbide & Carbon Corp.*, 249 F.2d 449, 459 (7th Cir. 1957).



was reversed and remanded for further proceedings consistent with the opinion.

Bendix obviously hopes that by admitting that it first became aware of the retroactivity issue due to the New Jersey Supreme Court's decision in *Coons v. American Honda Motor Co.* ("Coons II"), 96 N.J. 419, 476 A.2d 763 (1984), it can avoid the effects of its actions. However, retroactivity is not a new or unique issue which first came into existence as a result of the *Coons II* decision. The retroactivity issue existed long before *Coons II* as evidenced by the fact that, unlike the present case, it was raised from the inception in the *Coons* litigation. The same issue arose in *Thompson v. Commissioner of Internal Revenue, supra*, cited by the Court of Appeals. In *Thompson*, 631 F.2d at 649, appellants in their reply brief raised the issue of collateral estoppel through the citation of two cases which were decided after the opening brief was filed. The court rejected appellants' argument:

> Even though *Parklane* and *Starker* were intervening cases, the doctrine of collateral estoppel itself is hardly new. The general rule is that appellants cannot raise a new issue for the first time in their reply briefs. (Citations omitted)

Just as in *Thompson*, the issue of retroactivity is not a new issue which owes its existence to the *Coons II* decision. Having raised the issue for the first time in its reply brief, Bendix is precluded from pursuing it.

There is also a chilling effect which the prospective application of the lower courts' decisions would have on the legal profession. Lawyers would be unwilling to take on such complex cases, and clients would be unwilling to

pay for their lawyers' work on them, if the parties responsible for affecting such a change in the law cannot benefit from their own efforts. It is the public good which would suffer from such an impact since it is ultimately the public which benefits from such constitutional challenges. The retroactivity of this decision goes to the very core of the integrity of the judicial process and the failure to so apply it can only undermine that process. Justice, equity and fairness demand that the holding of unconstitutionality be applied retroactively at the very least to Midwesco. Retroactive application is also the sole means of preventing Midwesco from suffering further constitutional deprivation. The prospective application of the opinion herein would merely recognize the very unconstitutionality which the lower courts have sought to abrogate.

While it is true that in *Coons II* the New Jersey Supreme Court applied its decision in *Coons I* prospectively, it was a 4 to 3 split decision which factually can be easily distinguished from the case at bar. It must first be noted that *Coons II* was decided under New Jersey state law and not under federal retroactivity law. In fact, the court in *Coons II* acknowledged that retrospectivity is the traditional rule and that "ordinarily the fruits of the struggle are awarded the successful litigant." *Coons II*, 476 A.2d at 772. The court in *Coons II* was also swayed by the belief that its decision did not result in any injustice to Honda since it was an "institutional litigant" composing a class that in the future would frequently have resorted to the statute of limitations. *Id.* Additionally, as set forth below, the case history of the tolling statute in Ohio is quite different from that of New Jersey.



As previously stated, the *Chevron Oil* test is inappropriate because it involved the retroactive effect of a separate decision rather than the application of a finding of unconstitutionality in the very case before the court. See, *e.g., Shannon v. United States Civil Service Commission*, 444 F.Supp. 354, 369 (N.D.Ca., 1977), *modified on other grounds*, 621 F.2d 1030 (9th Cir. 1980). Were the court, however, to apply the *Chevron Oil* test its attention must be directed to the fact that Bendix fails to establish, as it must since prospective application is exceptional, that it has met all three parts of the test. *Cochran v. Birkel*, 651 F.2d 1219, 1223 n. 8 (6th Cir. 1981).

As *Chevron Oil* recognizes, the general rule is one of the retroactiove application of such decisions. The first factor under *Chevron Oil* to be met in order to establish nonretroactivity is that the decision in question must establish a new principle of law either by overruling clear past precedent on which litigants may have relied or by deciding an issue of first impression whose resolution was not clearly foreshadowed. As Bendix concedes, the lower courts' decisions did not overrule clear past precedent on which it may have relied. The case history of the tolling statute did foreshadow the lower courts' holdings and illustrates that the decisions did not represent a "clean break" with the past. The courts in *Title Guaranty and Surety Company v. McAllister*, 180 Ohio St. 537, 200 N.E. 831 (1936) and *Thompson v. Horvath*, 10 Ohio St. 2d 247, 227 N.E.2d 225 (1967), both held that the tolling statute did not toll the statute of limitations for a cause of action against a foreign corporation which was amenable to service of process. Both of these cases were approvingly cited as

recently as 1971 by the Court of Appeals in *Partis v. Miller Equipment Co.*, 439 F.2d 262 (6th Cir. 1971), which similarly held that the tolling statute did not apply to toll the statute of limitations as to a foreign corporation which was amenable to service of process.

The court in *Seeley v. Expert, Inc. supra,* held that the tolling statute applied to a non-resident owner or operator of a motor vehicle. The court in *Seeley* did not overrule or reject its prior decisions in *McAllister* and *Thompson* and in fact specifically distinguished those cases as not involving a non-resident motorist or owner of a motor vehicle. Despite this, the court in *Ohio Brass v. Allied Products Corp.*, 339 F.Supp. 417 (N.D.Ohio 1972), refused to follow the *McAllister-Thompson* line of cases based upon its conclusion that *Seeley*, affected a change in Ohio law. Subsequent to *Ohio Brass*, however, the court in *Hayden v. Ford Motor Co.*, 364 F.Supp. 398 (N.D.Ohio 1973), held that *Partis* was still the controlling law on the question of the application of the tolling statute to a non-resident corporation which was amenable to service of process. Thus, Ohio case law clearly foreshadowed a finding that the tolling statute would not apply to foreign corporations which were amenable to service of process.

The second factor of the *Chevron Oil* test is whether the retrospective operation of the decision will further or retard the operation of the new rule of law. The prospective application of the decisions herein as sought by Bendix mocks the decision itself inasmuch as the lower courts' decisions struck the tolling statute as unconstitutional. The prospective application would give credence to that which the courts have already found to be unconstitutional.



This further evidences the inapplicability of the *Chevron Oil* test to this case.

The third factor of the test is whether retroactive application could produce substantial inequitable results. Quite to the contrary, as already established, it is the prospective application which undoubtedly would cause inequitable results. Bendix fails to delineate any inequitable results arising from retroactive application. There is not even a scintilla of evidence anywhere in the record evidencing Bendix's reliance on the tolling statute. The reason for this is that Bendix raised this argument for the first time in its reply brief before the Court of Appeals.

Midwesco does not believe that the Court should even consider the issue of retroactivity or, if it does, that the *Chevron Oil* test is the appropriate standard to be applied. However, even in the event that the court were to apply the *Chevron Oil* test, it is clear that Bendix cannot comport with the three factors and thus the holding of unconstitutionality must be applied retroactively.

Bendix, citing simply two cases, makes the overly broad and incorrect statement that decisions serving to shorten a limitations period are in most instances singularly inappropriate for retroactive application. Neither of the cases cited by Bendix involve a statute being declared unconstitutional as in the present cause. Both cases simply concern a change in the relevant limitations period brought about by decisions in other cases. Here, there was a finding in this very case that the tolling statute was unconstitutional.

Moreover, Bendix's statement is simply untrue. Courts routinely apply decisions retroactively even where they

serve to shorten the limitations period for the filing of suit. See, *e.g., Smith v. City of Pittsburgh*, 764 F.2d 188 (3d Cir. 1985) (involving the same statute, 42 U.S.C. § 1983, and the same case as in *Jackson v. City of Bloomfield*, 731 F.2d 652 (10th Cir. 1984), cited by Bendix); *Ciccarelli v. Carey Canadian Mines, Ltd.*, 757 F.2d 548 (3d Cir. 1985); *Edwards v. Sea-Land Service, Inc.*, 720 F.2d 857 (5th Cir. 1983); *Perez v. Dana Corp., Parish Frame Div.*, 718 F.2d 581 (3d Cir. 1983).

There is no justification for anything other than the retroactive application of the lower courts' decisions holding the tolling statute unconstitutional.

———o———



## CONCLUSION

For the aforesaid reasons, the lower courts correctly held that the Ohio tolling statute is unconstitutional as applied to Midwesco, for violating the Commerce Clause. This Court should affirm the lower courts' decisions granting Midwesco's motion for summary judgment and dismissing Bendix's claims against Midwesco.

Respectfully submitted,

IRA J. BORNSTEIN
Counsel of Record
HARVEY J. BARNETT &
ASSOCIATES, LTD.
200 North LaSalle Street
Suite 1920
Chicago, Illinois 60601
(312) 78 1869
*Attorney for Appellee*

OF COUNSEL:

HARVEY J. BARNETT
HARVEY J. BARNETT & ASSOCIATES, LTD.
200 North LaSalle Street, Suite 1920
Chicago, Illinois 60601
312/782-1869

# APPENDIX

## OHIO REV. CODE § 1703.041

(A) Every foreign corporation for profit that is licensed to transact business in this state, and every foreign nonprofit corporation that is licensed to exercise its corporate privileges in this state, shall have and maintain an agent, sometimes referred to as the "designated agent," upon whom process against such corporation may be served within this state. The agent may be a natural person who is a resident of this state, or may be a domestic corporation for profit or a foreign corporation for profit holding a license as such under the laws of this state which is authorized by its articles of incorporation to act as such agent, and which has a business address in this state.

---

## OHIO REV. CODE § 1703.02

Sections 1703.01 to 1703.31, inclusive, of the Revised Code do not apply to corporations engaged in this state solely in interstate commerce, including the installation, demonstration, or repair of machinery or equipment sold by them in interstate commerce, by engineers, or by employees especially experienced as to such machinery or equipment, as part thereof; to banks, trust companies, building and loan associations, title guarantee and trust companies, bond investment companies, and insurance companies; or to public utility companies engaged in this state in interstate commerce.

---

OHIO CIVIL RULE 4.2(6)

Service of process, except service by publication as provided in Rule 4.4(A), pursuant to Rule 4 through Rule 4.6 shall be made as follows:

(6) Upon a corporation either domestic or foreign: by serving the agent authorized by appointment or by law to receive service of process; or by serving the corporation by certified mail at any of its usual places of business; or by serving an officer or a managing or general agent of the corporation.

---

N.J.S.A. 2A:14-22

If any person against whom there is any of the causes of action specified in sections 2A:14-1 to 2A:14-5 and 2A:14-8, or if any surety against whom there is a cause of action specified in any of the sections of article 2 of this chapter, is not a resident of this state when such cause of action accrues, or removes from this state after the accrual thereof and before the expiration of the times limited in said sections, or if any corporation or corporate surety not organized under the laws of this state, against whom there is such a cause of action, is not represented in this state by any person or officer upon whom summons or other original process may be served, when such cause of action accrues or at any time before the expiration of the times so limited, the time or times during which such person or surety is not residing within this state or such corporation or corporate surety is not so represented within this state shall not be computed as part of the periods



of time within which such an action is required to be commenced by the section. The person entitled to any such action may commence the same after the accrual of the cause therefor, within the period of time limited therefor by said section, exclusive of such time or times of nonresidence or nonrepresentation.

---

N.J.S.A. 14A:4-1

(1) Every corporation organized for any purpose under any general or special law of this State and every foreign corporation authorized to transact business in this State shall continuously maintain a registered office in this State, and a registered agent having a business office identical with such registered office.

(2) The registered office may be, but need not be, the same as a place of business of the corporation which it serves.

(3) The registered agent may be a natural person of the age of 21 years or more, or a domestic corporation or a foreign corporation authorized to transact business in this State, whether or not any such agent corporation is organized for a purpose or purposes for which a corporation may be organized under this act.

(4) The designation of a principal or registered office in this State and of a registered agent in charge thereof by any corporation of this State or by any foreign corporation authorized to transact business in this State, as in force on the effective date of this act, shall continue

with like effect as if made hereunder until changed pursuant to this act.

---

## NEW JERSEY RULE 4:4-4(c)(1)

Service of summons, writs and complaints shall be made as follows:

(c)(1)Upon a domestic or foreign corporation by serving, in the manner prescribed in paragraph (a), either an officer, director, trustee, or managing or general agent; or any person authorized by appointment or by law to receive service of process on behalf of the corporation; or the person at the registered office of the corporation in charge thereof. If service cannot be made upon any of the foregoing, then it may be made upon the person at the principal place of business of the corporation in this State in charge thereof, or if there is no place of business in this State, then upon any servant of the corporation within this State acting in the discharge of his duties. If it appears by affidavit of plaintiff's attorney or of any person having knowledge of the facts that after diligent inquiry and effort personal service cannot be made upon any of the foregoing and if the corporation is a foreign corporation, then, consistent with due process of law, service may be made by mailing, by registered or certified mail, return receipt requested, a copy of the summons and complaint to a registered agent for service, or to its principal place of business, or to its registered office.

---



## FORMER IDAHO CODE § 30-509

Every such corporation which fails to comply with the provisions of this chapter shall be denied the benefit of the statutes of the state limiting the time for the commencement of civil actions, and any limitations in such statutes shall only run in favor of any such corporations during such time as such person duly designated, as aforesaid, upon whom such service can be made, shall be within the state.

---